action, as much so as if he had sued alone; in the latter each will stand on his own personal merits or individual defence.

Nor have we gone into the question whether the authority of a partner to bind his copartner within the scope of the partnership, may not be revoked or restricted as to *executory* contracts, with notice to the party dealing with him to that effect. We are inclined to think that it may, and that it was so held in the case of *Leavitt* vs. *Peck*, 3 Conn. 124. But the payment of an existing debt to one of the partners, notwithstanding the request of the other that it should not be so paid, is a very different matter. Debtors have rights of their own, and they are not dependent upon the continuance of partnership authority for the discharge of their duties. Unless there has been an assignment with notice, or an injunction from Chancery, they may treat each partner of the firm to which they are indebted as representing the whole company, however numerous.

We advise a new trial, unless the amount of the payment in question shall be remitted on the record.

In this opinion the other judges concurred.

RECENT ENGLISH DECISIONS.

Court of Common Bench.

KENNEDY *vs.* BROUN AND WIFE.[1]

A promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect.

The relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation.

A barrister became the advocate of the female defendant, and during the continuation of the litigation she made repeated requests to him for exertions as such, and repeatedly promised to remunerate him for the same; and after the end of the litigation she spoke of the amount of this remuneration, and admitted the amount of debt due for such remuneration to be a certain sum, and promised to pay it: *Held*, that these facts did not constitute any obligation on the part of the defendant to pay.

[1] 7 L. T. Rep., N. S. 626. 9 Jurist Rep., N. S. 119.

This was an action of account stated with defendant's wife, *dum sola*. The pleadings, as they eventually stood, consisted of a count on an account stated, plea *nunquam indebitatus* and thereupon issue.

At the trial a verdict was found for plaintiff, with 20,000*l.* damages, with leave reserved to move to enter a verdict for the defendant.

A rule having been obtained, accordingly,

Nov. 10, 1862, *Kennedy* in person showed cause.—I contend, first, that I am entitled to recover under the rule laid down in *Lampleigh* vs. *Brathwaite*, Hob. 105, 1 Smith L. C. 135, that a voluntary courtesy, moved by a previous request, will uphold a subsequent promise of payment; secondly, that I have a good right of action under the promise to compensate me for loss and damage, irrespectively of the claim for services as counsel; thirdly, that remuneration for my services as counsel is recoverable under the express contract, and that the count on an account stated is applicable to each of these cases: *Harris's Case*, Dyer 272, note 29; *Sidnam* vs. *Worthington*, Cro. Eliz. 42; *Townsend* vs. *Hunt*, Cro. Car. 408; *Bosden* vs. *Thinne*, Yel. 400; *Marsh* vs. *Rainsford*, 2 Leo. 111. Comyn's Dig. *Act. on Case in Assumpsit*, B. 12. This rule is so clear that I should not dwell on it but for a misapprehension which appears to have been created by the note in *Wennall* vs. *Abney*, 3 Bos. & Pull. 247, and the language of Lord DENMAN in *Eastwood* vs. *Kenyon*, 11 Ad. & El. 438; and *Roscorla* vs. *Thomas*, 3 Q. B. 234. The whole law on this subject was discussed in *Bradford* vs. *Roulston*, 8 Irish Rep. 468; *Veitch* vs. *Russell*, 3 Q. B. 928; *Knowles* vs. *Mitchell*, 13 E. 249; *Highmore* vs. *Primrose*, 5 M. & S. 65; *Roper* vs. *Holland*, 3 A. & E. 99; *Pardoe* vs. *Price*, 16 M. & W. 458; *Edwards* vs. *Lowndes*, 1 E. & Bl. 89; *Topham* vs. *Morecroft*, 8 E. & Bl. 972; *Moor* vs. *Hill*, 2 Peake 10; *Cleaver* vs. *Moor*, 3 Jur. N. S. 475; *Greaves* vs. *Cook*, 2 Jur. N. S. 475; *Cocking* vs. *Ward*, 1 C. B. 858. *Secondly.* The magnitude of my loss or the benefit to the defendant is immaterial. *Sturlyn* vs. *Albany*, Cro. Eliz. 67; *Haigh* vs. *Brookes*, 10 Ad. & El. 309; *Bunn* vs. *Guy*, 4 E. 190; *Shadwell* vs. *Shadwell*, 9 C. B., N. S., 159. *Thirdly.* It is laid down by Blackstone, 3 Com. 28, that

counsel cannot maintain an action for fees, and he refers to 1 Chan. Rep. 38, and Sir John Davies' Rep. pref. 22.

The fee, which was at a late period called "*honorarium*," did not form the subject of what the Romans called "*actio*" (and this is the origin of Blackstone's mistake), but by the *extraordinaria cognitio* before the magistrate or *præses* of the province. Sandars' Institutes, 475; Dig. 50, tit. 13. The fees therefore at Rome differed from those in England in three ways—they were recoverable, limited in amount, and payable after the business was done. The term *honorarium*, as applicable to a counsel's fee, was for the first time introduced by Sir JOHN DAVIES, in that preface which Blackstone refers to, and which is so often cited as an authority for the alleged custom; but there is no truth in this statement, and this *honorarium* must have been the creation of his own brain. Formerly counsel communicated directly with their clients without the intervention of attorneys, and to meet them the serjeants and apprentices used to frequent the Previse or portico of St. Paul's. Chaucer 311; Hollinshed Chron. 1, 304; Hall's Chron. 503; Fortescue, p. 196, Amos' ed.; Dugd. Orig. 142; Stowe's Survey 1, 745; Addison's Templars 375; Ryley's Parl. Plead. 104; Crabb's Hist. Eng. Law. Then as to fees, which word means a stipend, and not an *honorarium;* and the words "salary," "hire," and "wages," are frequently applied to counsel's remuneration. 27 Ed. 3, c. 29; 5 Rich. 2, c. 16; 23 Hen. 6, c. 10; Johnson's Life of Coke 1, 79. And in the mirror of justice a serjeant's fee is called salary. [ERLE, C. J.—Down to my time Queen's counsel received "salary."]—Then as to the fees being recoverable, in Brownlow's Entries (published in 1854), p. 172, there is a declaration in debt by a counsel, stating "that the defendant had retained him to be his counsel in any action in which he should sue or be sued, *pro* salaries 6*s*. 8*d*. a year," claiming five years' arrears, with a count for 6*s*. 8*d*. for money lent. Also Rastall's Entries, p. 194, tit. "*Debt*," pl. 3; Id. p. 203; p. 202, pl. 6, 7, 8; Id. p. 429, tit. "*Maintenance*," pl. 10, 11; 34 Hen. 6, Year Book 27; 5 Foss's Judges of England 91; Manning's Serviens ad Legem, p. 272; Plowden, pp. 32, 160; Com. Dig. "*Debt*," A. 8; Cro. Jac. 482; 8 Mod. R. 42. We also find that actions were brought against

counsel. Year Books, 14 Hen. 6, fo. 18; 20 Hen. 4, fo. 34, Rolle s Abr. "*Action sur case*," 6, 91; *Moore* vs. *Rowe*, 1 Chan. Rep. He also referred to *Thornhill* vs. *Evans*, 2 Atk. 330; *Morris* vs. *Hunt*, 1 Chit. 544; *Hobart* vs. *Butler*, 9 Tr. Crom. Rep. 157; *Doe* vs. *Hall*, 15 Q. B. 171; *Egan* vs. *Kensington Union*, 3 Q. B. 935; *Re May*, 2 Jur. N. S. 1169; *Vivany* vs. *Warne*, 4 Esp. 46; *Hoggins* vs. *Gordon*, 3 Q. B. 436; *Marsack* vs. *Webber*, 6 H. & N. 5; *Re Hall*, 2 Jur. N. S.; *Swinfen* vs. *Lord Chelmsford*, 5 H. & N. 919.

Macaulay, Q. C. in support of the rule.—There is no evidence to support a contract of account stated. If terms imported into an account are not recoverable, no question can arise on any account stated thereon. *Truman* vs. *Hurst*, 3 R. 40; *Petch* vs. *Lyon*, 9 Q. B. 147; *French* vs. *French*, 2 M. & G. 644; *Thomas* vs. *Hawkes*, 8 M. & W. 140; *Penrice* vs. *Parke*, Finch 75; *Thornhill* vs. *Evans*, 2 Atk. 330, 332; *Box* vs. *Barnaby*, Hobart 117; *Wood* vs. *Downes*, 18 Ves. 120; *Huguenin* vs. *Baseley*, 2 W. & T. Tud. L. C. 462; *Earle* vs. *Hopwood*, 9 C. B., N. S., 566.

Field on the same side.—*Whitehead* vs. *Howard*, 5 Moore 105; *Pierce* vs. *Evans*, 2 C. M. & R. 294; *Lubbock* vs. *Tribe*, 3 M. & W. 607; *Scadding* vs. *Eyles*, 9 Q. B. 858; *Brooks* vs. *Bockett*, 9 Q. B. 849.

No action lies on ordinary fees, nor on an express contract by counsel for work done as counsel. Vin. Abr. "*Counsellor*," pl. 22, covers the second proposition as well as the first: *Poucher* vs. *Norman*, 3 B. & C. 744; *Hoggins* vs. *Gordon*, 3 Q. B. 474. Forms of action are no doubt given as in Rastall's Entries 194; but there the judgment went by default, and it is a pregnant fact that from that time no authority can be found. The plaintiff relies chiefly on *Lampleigh* vs. *Brathwaite*, but the ground of that decision is questionable. *Roscorla* vs. *Thomas*, 3 Q. B. 234, and *Kay* vs. *Dutton*, 2 D. & L. 291, have shaken *Lampleigh* vs. *Brathwaite*.

Jan. 16, 1863.—ERLE, C. J.—In this case the defendant obtained a rule to show cause why the verdict for the plaintiff should not be

set aside, and either entered for the defendant if there was no evidence of a debt, or for a new trial if the verdict was against the evidence. The material facts upon the question are, in the course of the suit of *Swinfen* vs. *Swinfen* the plaintiff, a barrister, became the advocate of the present defendant, and during the continuance of that litigation she made repeated requests to him for exertions as an advocate, and repeatedly promised to remunerate him for the same, and after the end of the litigation she spoke of the amount of this remuneration; and for the purposes of the present judgment we assume that she admitted the amount of debt due for such remuneration to be 20,000*l.*, and promised to pay it. These facts are no evidence to support the verdict if the promise of the defendant did not constitute any obligation; and we are of opinion that it did not. We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation. For authority in support of these propositions we place reliance on the fact that in all the records of our law, from the earliest time till now, there is no trace whatever either that an advocate has ever maintained a suit against his client for his fees in litigation, or the client against an advocate for breach of a contract to advocate; and as the number of precedents has been immense the force of this negative fact is proportionally great. To this we add the tradition and understanding of the profession, both as known to living memory and as expressed in former times. Sir JOHN DAVIES (Davies's Rep., Pref. 23) declares that understanding at the beginning of the 17th century, when he says "that the fees of professors of the law are not duties certain, growing due by contract for labor or service, but gifts; not *merces*, but *honorarium*." Sir JOHN DAVIES would have ample experience of the rules of the profession from his eminence in the law, and his opinion is entitled to much weight. Lord STOWELL, as appears in a work remarkable for learned research (Wallace's Reporters 27), speaks of him as "a poet, a lawyer, and a statesman, and highly distinguished in each

of these characters." Lord HALE declares the same understanding of the profession in the note to Co. Lit. 295 a, saying, "a counsellor cannot bring any action (*id est* for his fees), for he is not compellable to be a counsellor. His fee is *honorarium*, and not a debt;" and for this he cites Lord NOTTINGHAM'S MSS. The same note contains the opinion of Mr. Butler to the same effect, saying that in England the fees of counsel are honorary in the strict acceptation of the word. Blackstone also (vol. 3, p. 28) declares the same understanding: "A counsel can maintain no action for his fees, which are given not as *locatio* or *conductio*, but as *quiddam honorarium*, not as salary or hire, but as mere gratuity." As we know of no authorities that conflict with these, we only add the names of the judges who have had occasion to declare an opinion to the same effect, and they are Lord HARDWICKE, Lord KENYON, KINDERSLEY, V. C., PIGOT, C. B., of Ireland, and BAYLEY and BEST, Js. See also *Thornhill* vs. *Evans*, 2 Atk. 311; *Turner* vs. *Phillips*, 1 Peake 166; *In Re May*, 4 Jur. N. S. 1169; ——— vs. *Butler*, 9 Jur. C. L. Rep. 157; and *Morris* vs. *Hunt*, 1 Chit. 544. These are authorities for holding that the counsel cannot contract for his hire in litigation. The same authorities we rely on to show that the client cannot contract for the service of a counsel in litigation. There is the same absence of any precedent for such an action, and the reason for the one incapacity is good for both.

We proceed to the authorities on which the plaintiff relied. Instead of examining each citation separately, we think it more convenient to take them in classes, and to give the reason why each class appears to us to have no weight. The proposition is confined to incapacity for contracts concerning advocacy in litigation. This class of contracts is distinguished from other classes on account of the privileges and responsibility attached to such advocacy, and on this ground we consider the cases unconnected with such advocacy to be irrelevant. Thus the barrister who contracted to serve as returning officer (*Egan* vs. *Kensington Union*, 3 Q. B. 234), and the barristers who contracted to serve as arbitrators (*Virany* vs. *Warne*, 4 Esp. 46; *Hoggins* vs. *Gordon*, 3 Q. B. 466; *Marsack* vs. *Webber*, 6 H. & Norm. 5), and the barristers who contracted

either for an annual sum by way of retainer, 39 Hen. 6, fol. 21, pl. 31, or for an annuity *pro consilio impenso et impendendo*, Plowd. 32, 160, made contracts not concerning litigation, and therefore not within the incapacity here in question. It may be that a contract for a general retaining fee for a counsel may not bind at the present day, because it relates in substance to litigation, and so may be distinguished from annuities to a standing counsel who was required to guide by his advice in the management of property and general affairs. The change in the habits of courts and the practice of the bar since the last-mentioned cases were decided, has probably made the position of an advocate now as different from that of standing counsel then as the position of the clergy now differs from that which they held when private chaplains were hired to serve as chaplains and perform other work, and were prosecuted for breach of their contracts to serve under the statute of 23 Edward 3, relating to laborers, in one of which prosecutions, against a parochial chaplain for breach of his contract to serve as seneschal and be parochial chaplain, the Court of C. P. thought that as far as related to his duty as chaplain he might be considered to be in the service of God, and therefore not within a statute expressed to relate to mowers and reapers and the like, but hesitated so to decide till they had consulted their brethren of the other bench, and had their sanction. But, be that as it may, fees unconnected with litigation are irrelevant to our present judgment, and this distinction seems to be taken in *Mingay* vs. *Hammond*, Cro. Jac. 482, where the plaintiff sued for an annuity *pro consilio*. The defendant pleaded a refusal of the plaintiff to sign a bill in the Star Chamber, and the plea was held bad because a counsellor with such a fee is not bound to put his hand to every bill, but only to give counsel.

With respect to the *dicta* cited by Mr. *Kennedy*, relating to the liability of counsel for their conduct as advocates, they are all considered and overruled in the action of *Swinfen* vs. *Lord Chelmsford*, 5 Hurl. & N. 918. Some relate to retainers relating to purchases of land, or similar services, and so are not within the incapacity here in question, 1 Hen. 6, fol. 18, pl. 10; and, although the *dictum* of PASTON, C. J., 14 H. 6, fo. 18, pl. 58, "that action

lies against a serjeant who fails to attend in court," and a *dictum* by Stokes, counsel, to the same effect, relate to litigation, yet they are mere remarks in the course of an argument, and not adjudications, and they were expressly overruled as before mentioned.

Mr. *Kennedy* cited Rastall's Ent. 2, as containing precedents for actions against an attorney or counsel, for not appearing in court according to his retainer; but the book contains no entry against a counsel for that wrong. There are three entries in succession. The first is against an attorney and is for that wrong. The second precedent is against a counsel who was retained to advise about the purchase of a manor, and betrayed his client's secrets and interests, and is not an entry which relates to litigation; and the third is against a counsel, but it is for a penalty under a statute, for taking retainers on both sides as an *ambidexter*. The citation from Rastall, therefore, does not support the plaintiff's argument. A considerable part of Mr. *Kennedy*'s learned research consisted of anecdotes of various classes relating to barristers, irrelevant to the point for adjudication, because irrelevant to capacity or incapacity for contracting for advocacy. Such are the anecdotes relating to the habits of barristers when they held communication with their clients personally, before the rights and duties of attorneys and solicitors were ascertained, and the advocate did the work of each branch of the profession—habits which continued in Jersey until lately: (see *Jersey Case*, 13 Moo. P. C. 263.) Such also are those relating to alleged endeavours by barristers to obtain larger fees. Whether this has been done or not, and whether a communication in respect of the amount of the fees be made to the client by the clerk or the barrister, the nature of the fee is not altered, nor is the right to sue for it effected thereby. Such also are those relating to payment after instead of before the service is performed. In England the general usage is pre-payment. On the continent, under the Roman law and the modern French law, and in some exceptional cases in England, the fee is paid after the service. But again, the nature of the fee is not altered by the time of payment. The anecdotes in each of these classes show that the payments are of gratuities and not of debts, and, so far as they are to be noticed

for adjudication, tend to support the defendant's case. As to express contracts, certain *dicta* by PIGOT, C. B. (*Hobart* vs. *Ruck*, 9 Ir. C. L. Rep. 27), and by POLLOCK, C. B. (*Swinfen* vs. *Lord Chelmsford*), were cited for the purpose of proving that a barrister had capacity to make himself liable under a special contract with his client concerning advocacy, though not by an implied contract. We think that the effect of those *dicta* has been misunderstood. A special contract differs from an implied contract only in the mode of proof. If a brief marked with a fee for a given place of trial is left in silence, there would be some evidence of an implied contract to pay the fee were there no usage to the contrary, and no incapacity for such a contract. If the same brief is left with an express contract to pay the fee, there would be an express contract if there were no incapacity. Where the service of the barrister according to usage is for a gratuity, that usage would be presumed to continue unless there was an express contract rebutting that presumption, and where there is no incapacity the presumption from usage is rebutted by an express contract. POLLOCK, C. B., does not refer to any authorities, but the cases referred to by PIGOT, C. B., show that this was his meaning, for he refers to the cases above mentioned, where barristers, either as returning officers or as arbitrators, sustained actions for their fees. The incapacity depends on the subject-matter of the contract, not on the mode of proof. When the contract is proved its incidents are the same whatever was the kind of evidence adduced for proof. If there is incapacity, words and implication are alike nullities, and no contract can result; but where there is no incapacity, and there are conflicting presumptions in respect of the *consensus* essential to create contract, there evidence of express words of clear meaning is decisive proof. In this sense the observation of WOOD, V. C. (*Attorney-General* vs. *College of Physicians*, 1 Jo. & H. 561), must be understood, saying, "That a physician might recover his fees if he makes a special contract." We know of no incapacity affecting a physician according to usage, the practice being for a fee, which is *honorarium*, not *merces*; and no action lies where the parties are presumed to have acted according to this usage; but if the presumption is re-

butted by evidence of an express contract, such contract binds, and a physician may sue and be sued thereon, as was held in *Veitch* vs. *Russell*, 3 Q. B. 928.

Mr. *Kennedy* argued that under the civil law an advocate could sue for his fees, and that Blackstone made a mistake in referring thereto to support a contrary opinion. In this it appears to us that the mistake is on the part of the plaintiff. Throughout the whole growth of the civil law, from the foundation of Rome to the Digest of Justinian, not only was the advocate always under incapacity to make any contract for his remuneration, but also throughout a part of that time he was under prohibition from receiving any gain for his services; whether the same be *donum*, or *merces*, or *honorarium*, is immaterial; the substance of the law was invariable, he never could contract for *merces*, though during part of the time he might lawfully accept a *donum*. In the beginning all agree that the patron received no money for advocacy; afterwards he took gifts to an excess, and was restrained in the year 550 A. U. C., by the "Lex Cincia de donis et muneribus ne quis ea ob causam orandam caperet." If gifts were prohibited, *à fortiori* contracts for payments would not be allowed. This prohibition of all gifts for advocacy was further enforced by Augustus in the year 732 A. U. C., commanding advocates to plead gratuitously, and for breach they were ordered to refund fourfold. This prohibition against all gifts to advocates was relaxed in a time of great debasement, when, according to the passage in Tacitus referred to by Blackstone (Annal. lib. 11, c. 7), "Non quicquam publicæ mercis tam venale fuit quam advocatorum perfidia." The Senate sought to enforce the Cincian law forbidding all gifts for protection against abuses on the part of advocates. Sicinius, an advocate of singular infamy, offered some of the arguments which have been urged in support of mercenary advocacy. The Emperor took an intermediate course, and by a decree fixed the *maximum* which an advocate might lawfully receive by way of gift at 80*l*., and made him liable to refund if he took more. The words of Tacitus are—"Claudius capiendis pecuniis modum statuit ad dena sestertia, quem egressi repetundarum tenerentur." The Senate made a further

effort in the same direction, passing a law that every suitor before he took any step in the suit should swear that he had neither given nor contracted to give any money for advocacy. Pliny, in the passage referred to by Blackstone (Epist. lib. 5, 21), writing of a new edict by a prætor to enforce practically some recent laws, says: "Sub edicto erat senatus consultum hoc omnes qui quid negotii haberent, priusquam agerent, jurare jubebantur nihil se ob advocationem cuiquam dedisse, promississe, cavisse. His enim verbis et mille præterea et venire advocationes, et emi vetabantur. Peractis tamen negotiis permittebat pecuniam duntaxat decem millia dare." Although after this time gifts within the limited amount were lawful, still contracts with advocates, during litigation, are not shown to have been ever at any time sanctioned by the law of Rome. Mr. *Kennedy* referred to the Digest, lib. 50, tit. 13, art. 10 and 12, to prove that an advocate could sue for his fee under the extraordinary cognisance of the "præses," but we do not find that these articles prove his contention. Art. 10 seems to relate to a suit by a client against an advocate to make him refund so much of a fee already paid as exceeded the legitimate amount, and gives the principle for estimating what that amount should be: "In honorariis advocatorum ita versari debet judex ut pro modo litis, pro advocati facundiâ, et fori consuetudine in quo acturus erat estimationem adhibeat, dummodo licitum honorarium non egrediatur." The article concludes with a rescript applicable only to refunding part of a fee: "Eam duntaxat pecuniam quæ modum legitimum egressa est repetere debet." Art. 12 relates to securities and bargains for fees, and gives the rule when a suit can be maintained thereon. The effect seems to be that a promise while the litigation is pending does not bind, but that a security given after the cause is at an end may be enforced if the sum secured, together with the sums paid, does not exceed the legitimate amount.

We have now considered as much of the authorities referred to as seems to us to be relevant, and in our judgment they support the propositions on which the defendant relies—viz., that the relation of counsel and client in litigation creates an incapacity to con-

tract for hiring and service as an advocate. If the authorities were doubtful, and it was necessary to resort to principle, this same proposition appears to us to be founded on good reason. The facts of the present case forcibly show some of the evils which would attend both on the advocate and the client, if the hiring of counsel was made binding. In this case the advocate, by disclosing words of intimate confidence which passed in moments of helpless anxiety, has raised the phantom of a contract for a sum of monstrous amount, and of this we hope we may say that there is no one in the profession of the plaintiff who would be willing to accept from him this verdict of 20,000*l.* as a gift. In the present case, too, if the client compares the competence and peace secured for her, by her former advocate, with the perils and the miseries of wearisome litigation derived from her later advocate, the contrast may suggest to her that gratuity is preferable to contract as a mode of remunerating advocates. But it is not merely on such considerations as these that this law is based. The incapacity of the advocate in litigation to make a contract of hiring effects the integrity and dignity of advocates, and so is in close relation with the highest of human interests—namely, the administration of justice. We are aware that in the class of advocates, as in every other numerous class, there will be bad men taking the wages of evil, and therewith also, for the most part, the early blight that awaits upon the servants of evil. We are aware also that there will be many men of ordinary powers performing ordinary duties without praise or blame; but the advocate entitled to permanent success must unite high powers of intellect with high principles of duty; his faculties and acquirements are tested by a ceaseless competition proportioned to the prizes to be gained—that is, wealth and power and honor without, and active exercise for the best gifts of mind within. He is trusted with interests, and privileges, and powers almost to an unlimited degree. His client must trust to him at times for fortune, and character, and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and

the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning, and this power again is in practice only controlled by his own view of the interests of truth. It is of the last importance that the sense of duty should be in active energy proportioned to the magnitude of these interests. If the law is that the advocate is incapable of contracting for hire to serve, when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty—that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may maintain that client's right, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges intrusted to him by a constant recourse to his own sense of right. If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of popular clamor and powerful interest, speaking with the boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client; and such men are the guarantees to communities for the maintenance of their dearest rights, and the words of such men carry a wholesome spirit to all who are influenced by them. Such is the system of advocacy intended by the law, requiring the remuneration to be by gratuity; but if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty; that words sold and delivered according to contract for the purpose of earning hire would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates might be degraded. It may also well be that if contracts for hire could be made by advocates, an interest in litigation might be created, contrary to the policy of the law against maintenance, and the rights of attorneys might be materially sacrificed and their duties be imperfectly performed by unscrupulous advocates; and these evils, and others that may be suggested, would be unredeemed by a single benefit that we can perceive. The sub-

ject has been often and ably discussed, so that we have already said more than sufficient. We would only add, that in the growth of the English law the advocates have been important agents in establishing the liberty of thought and speech and action which has resulted from the contests in courts where such liberty has been contended for. The English advocates in our historical trials are entitled to be gratefully remembered, and it must not be forgotten that their minds were trained in the practice of advocacy without any contract. So also the Roman jurists are entitled to be gratefully remembered, because their intuitive sense of right showed to them where right was in the conflicts of interest perpetually arising, as the relations of man to man multiplied, and their words have helped to guide succeeding generations in their search for right when similar conflicts arose. And it must not be forgotten that throughout the Roman system it was held that an advocate and a professor of law would be degraded by a contract of hiring, and that his reward was to be gratuitous. Mr. *Kennedy* has cited the Digests, lib. 50, tit. 13, arts. 10 and 12, on which we have remarked above. The title relates to the limits of the *extraordinaria cognitio* of the *præses*, and it may not be superfluous to add art. 5, expressly excluding therefrom suits by the class of professors of law for a reason applicable to all advocates. "Proinde ne juris quidem civilis professoribus jus est quidem res sanctissima civilis sapientia, sed quæ pretio nummario non sit estimanda neque dehonestanda, quædam tametsi honeste accipiuntur, inhoneste tamen petuntur." On principle then, as well as on authority, we think that there is good reason for holding that the relation of advocate and client in litigation creates the incapacity to make a contract of hiring as an advocate. It follows that the requests and promises of the defendant and the services of the plaintiff created neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise.

By reason of that incapacity the present case is distinguished from *Lampleigh* vs. *Brathwaite*, and the cases following thereon. In all of them the defendant was assumed to have received from

the plaintiff such a valuable consideration as would have made a valid contract, if a promise had been made before the consideration had passed. Here the defendant received nothing from the plaintiff which was capable of forming a consideration to support a promise, at whatever time such promise may have been made. In *Lampleigh* vs. *Brathwaite* it was assumed that the journeys which the plaintiff performed at the request of the defendant, and the other services he rendered, would have been sufficient to make any promise binding if it had been connected therewith in one contract. The peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably, at the present day, such service on such request would have raised a promise by implication to pay what it was worth, and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount. On the same principle the cases cited in sequel to *Lampleigh* v. *Brathwaite* are also distinguished. In each of those cases the defendant had, by the permission of the plaintiff, received value belonging to the plaintiff which was sufficient to support any promise. As to one class, the original promise was excluded by the Statute of Frauds; but a subsequent promise was held to be evidence to support an action on an account stated: (*Pinchin* vs. *Chilcot*, 3 Car. & P.; *Sego* vs. *Deane*, 4 Bing. 459; *Tapping* vs. *Ward*, 1 C. B. 858.) As to another class a claim in equity to money was converted into a cause of action at law by an express promise to pay to the plaintiff: (*Roper* vs. *Holland*, 3 Ad. & E. 99; *Topham* vs. *Morecraft*, 8 Ad. & E. 972; *Moore* vs. *Hill*, 2 Peake 10.) For these reasons we think that the plaintiff's case is not within the principle of *Lampleigh* vs. *Brathwaite*, and we do not consider it to be our duty to extend the application of that principle.

With respect to the claim for compensation for leaving Birmingham and coming to London, and for services in issuing publications for the purpose of creating a prepossession in favor of the defendant, there are several answers, of which two will suffice. The first is, that these services were ancillary to the service as an advocate, and if the principal service could not be the subject of a con-

tract, neither could any service which was merely accessary thereto and of no value without the principal. The second is, that the account is stated of the total of the claims, and if any one of the claims of undefined amount is to be omitted the statement of the account is disproved, and the action founded on such statement of account fails.

We have now gone through the whole of the case, and we come to the conclusion that the plaintiff has not established a cause of action. It follows that the rule must be made absolute to enter the verdict for the defendant. If the judgment on this part of the rule should be reversed in a court of error, it will then be our duty to dispose of the remaining part relating to a new trial, and following the precedent in *Betts* vs. *Menzies*, 28 L. J. 370, Q. B., 4 Jur. Rep. N. S. 277, we order the part of the rule relating thereto to be suspended until further order.

Rule absolute to enter the verdict for the defendant.

It is seldom that we are presented with a case of such interest as the foregoing. Not only is the subject of the first importance as it concerns the rights and duties of the profession, and still more its habits and tone of feeling, but the case itself, as an exhibition of skill, learning, and judicial eloquence, is worthy of our most attentive study. Though we regret the position of Mr. Kennedy, as derogatory to the character and reputation of the bar, yet we cannot but admire the industry and learning with which he gathered his materials, and the boldness, ingenuity, and forensic skill with which he attacked the time-honored principle of the *honorarium*, so long the boast and pride of the English bar. But it is the judgment of the Court which more than all gives the case its value. It is undoubtedly one of the best judgments given by any Court in our day. It does not shirk the main question or decide upon a technicality, but, with the courage of conscious ability, grasps at once the true point of the case, and enunciates the principles of the law and their application, with rare judicial art and eloquence. Upon this case alone, Chief Justice ERLE may well be content to rest his reputation, and his brethren of the bench and the bar congratulate themselves on the opportunity to show that there are still among them worthy successors to the long line of illustrious men who have in times past adorned the administration of the law.

The contrary principle having been long regarded as settled in America, these remarks might properly close here; but, with the example before us of the opening of a question supposed to be closed for centuries, and its discussion and solemn adjudication upon principle as well as precedent, it may not be thought impertinent briefly to review the decisions and the arguments upon which they were rested.

One of the earliest reported cases in favor of the power of counsel to sue as such, is Brackenridge *vs.* McFarlane,

Add. 49, a Common Pleas decision in Pennsylvania, made in 1793. In this, though the counsel who sued was afterwards a distinguished Justice of the Supreme Court, and the Court was presided over by a learned and able Judge, who reported the case, yet the opinion briefly states that an attorney in Pennsylvania may recover for his services as counsel, over and above the legal fee due him as attorney. When, however, the point first came before the Supreme Court, in 1819, Mooney *vs.* Lloyd, 5 S. & R. 412, it was elaborately argued, and the decision in Brackenridge *vs.* McFarland overruled: Chief Justice TILGHMAN saying, "the policy of refusing this remedy has not been adopted without great consideration. The field is ample and would admit of a long discussion. But it is enough for us that no principle of law has been more clearly laid down, and that there is sufficient evidence of its being one of those principles which were adopted on the settlement of Pennsylvania." This decision, however, was in turn overruled in Gray *vs.* Brackenridge, 2 Penn. 75 (1830), the Court being composed of new Judges, with the exception of GIBSON, C. J., who expressed his satisfaction in overruling that case. In Foster *v.* Jack, 4 Watts 334 (1835), the later doctrine was affirmed, GIBSON, C. J., saying that he was dissatisfied with the decision in Mooney *v.* Lloyd. "On principle, because I was unable to comprehend why a valuable consideration might not raise an implied promise, as well as support an express one; and for its consequences, because I felt assured it would be found entirely incompatible with the business and necessities of both counsel and client here." "The dignity of the robe, instead of any principle of policy, furnishes all the arguments that can be brought to the support of it at the present day." Since this case, the law has been considered settled in Pennsylvania: Baulsbaugh *vs.* Frazer, 7 Harris 95 (1852). The same principle has been adopted expressly in many of the other States. Vermont, Vilas *vs.* Downer, 21 Vt. (6 Washb.) 419; Massachusetts, Thurston *vs.* Percival, 1 Pick. 415; Ames *vs.* Gilman, 10 Met. 239; New York, Lynch *vs.* Willard, 6 Johns. Ch. 342; Stevens *vs.* Adams, 23 Wend. 57, 26 Id. 451; Wilson *vs.* Burr, 25 Wend. 386; Merritt *vs.* Lambert, 10 Paige 352; Wallis *vs.* Loubat, 2 Denio 607; Delaware, Stevens *vs.* Monges, 1 Harrington 127; South Carolina, Duncan *vs.* Breithaupt, 1 McCord 149; Clendenin *vs.* Black, 2 Bailey 488; Ohio, Christy *vs.* Douglas, Wright 485; Kentucky, Rust *vs.* Larue, 4 Litt. 417; Caldwell *vs.* Shepherd, 6 Monr. 389; Tennessee, Newnan *vs.* Washington, Mart. & Yerg. 79; Missouri, Webb *vs.* Browning, 14 Mo. 354; Texas, Baird *vs.* Ratcliff, 10 Tex. 81; and Florida, Carter *vs.* Bennett, 6 Fla. 214. The American doctrine therefore may be considered settled in favor of the power to recover, in all the States, with the honorable exception of New Jersey. In Seely *vs.* Crane, 3 Green 35, it was expressly decided that counsel fees could not be recovered *eo nomine* in New Jersey; and this decision was affirmed in Van Atta *vs.* McKinney, 1 Harr. 235.

In some of the cases above cited, the common law rule is not urged at all, and in very few of them does it receive any adequate discussion. In some, the distinction between attorneys and counsellors or advocates, generally considered abolished in this country, is attempted to be preserved, though the same persons act in all of those capacities. But even in these cases the distinction is made merely to limit the attorney to his legal fees, and to allow him for such of his services as do not come strictly under the function of an attorney, his action on a *quantum meruit*.

The decisions generally are based on the ground of implied contract, as for other services, and the summary manner in which they set aside so time-honored a principle of the common law is not a little remarkable. The best argument on this side will be found in the opinion of CRABB, J., in Newnan *vs.* Washington, Mart. & Yerg. 79. "It is consonant with the nature of our institutions that faithful labors should be rewarded by reasonable remuneration." "We have here no separate orders of society; none of those exclusive privileges which distinguish the lawyer in England." On the score of public policy, it is the best. "Leave the doctrine as desired, and the happy moment will always be selected by the unconscientious, when the anxious suitor is elevated by hope or depressed by fear, to extort unreasonable advances in the shape of gratuities. But let it be known that industry and attention and ardor will certainly be compensated by reasonable payment, and you encourage forbearance on the part of the attorney or advocate. He is not tempted to get what he can while the fever of his client is up; he waits in security until his labors are performed, his services rendered, knowing that he will at last receive what a disinterested jury shall award."

This argument, it seems to us, is more specious than sound. Under any rule, the unconscientious will seize an opportune moment to extort gratuities from anxious clients; and the object to be aimed at is not the hopeless one of total prevention of oppression and rascality in individual cases, but the elevation of the general tone of the profession. And it is with no disrespect to that ancient institution, that we most earnestly deprecate a rule which commits the estimate of arduous professional labor to the uncertain tribunal of a jury box. For what is a jury trial between counsel and client, but a family quarrel, which strangers are called in to witness and decide—a scandalous affair which inevitably lowers the profession in the estimation of all bystanders?

It is said that the Paris bar regards such suits as dishonorable, though allowed by the law of France, and would punish an advocate who should sue, by striking him from the list (Sharswood, Prof. Ethics, p. 84); and it is true that the feeling of the bar in America, at least in the large cities, will generally prevent any but an aggravated case from going to suit. But who shall say how long this will be so, or where the relaxation of professional tone shall stop, which is thus begun?

It is said, moreover, that the common law rule is a mere matter of theory, supported, as C. J. GIBSON, expresses it, by "the dignity of the robe." As a mere question of remuneration, we may concede that there is no practical difference at all. No one pretends that the English bar, under their rule, is less liberally, less promptly, or less generally paid than ours; the fact, from various causes, is notoriously the reverse. And this objection, therefore, appears to be the strongest argument in favor of the old rule; for what is more desirable than the preservation of "the dignity of the robe," so to speak, the fostering of that spirit which binds the bar together as brethren of an honorable profession, and subjects their general tone and character to the restrictions of a moral force which the most reckless and unprincipled dare not wholly defy?

So much upon general principle. Upon authority, the common law rule is not questioned in our cases, and it is overruled on the vague ground of unsuitableness to our institutions. Why unsuitable? Not because it deprives the

lawyer of his just compensation, for the English barrister is at least as punctually paid as the American attorney. But, says Judge CRABB, "we have here no separate orders of society." Are we to understand, then, that it is unsuitable because it is undemocratic? Surely, to deprive a man of the right to sue for his services, which belongs to the most menial laborer, is not investing him with an aristocratic privilege, dangerous to republican liberty. And a profession whose ranks are free to all who choose to enter, can never in a country like this become an obnoxious aristocracy, though its dignity, its learning, and its honorable character may give it so much of moral precedence as is implied in its hard-earned title of a learned profession.

We have been led into this length of discussion against our will; for, however profound our convictions on the subject, the decisions are made, and we must bow to them; but we may at least venture a hope that this case will challenge attention in those states where the law has not been expressly decided, and may even yet arrest what must be conceded to be the general current of the American decisions. J. T..M.

Court of Common Pleas. Jan. 16, 1863.

BRAMPTON *vs.* BEDDOES.[1]

The defendant, a general draper, sold the good-will of his business to the plaintiff under a written agreement, one of the terms of which was as follows:—"That the defendant should not carry on, or assist in carrying on, a business such as is now carried on at 17 Lupus street, Pimlico, being a general drapery and hosiery business, within two miles of that place." The defendant afterwards went into the district for the purpose of collecting old debts, and being there was asked by some persons to supply them with goods, which he did:

Held, in an action for breach of the agreement against the defendant for carrying on business within the prescribed limits, that in order to do so to such an extent as to be a breach of the contract, it was not necessary he should have either place of business or house within the district.

This case was tried before WILLES, J., in London, when a verdict was found for the plaintiff, leave being reserved to set it aside on the ground that the breach was not proved. The action was brought for the breach of an agreement, whereby the defendant was bound not to carry on or assist in carrying on a general drapery and hosiery business within a certain district. The facts were as follows:—

The defendant sold his business, which was that of a general draper, to the plaintiff, under a written agreement, the following

[1] 7 Law Times Rep. N. S. 679.